

EX PARTE OR LATE FILED

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 21 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act)
)
Competitive Bidding)

EX PARTE COMMENTS OF PLUSCOM, INC.

PlusCom, Inc. ("PlusCom"), by its attorneys and pursuant to Sections 1.1206(a)(1) and (3) of the Commission's Rules, hereby submits ex parte comments in the captioned docket.^{1/} PlusCom files these ex parte comments to answer questions arising out of a June 20, 1994 ex parte meeting between PlusCom and members of the PCS Task Force, including Ralph A. Haller, Chief, Private Radio Bureau, William E. Kennard, FCC General Counsel, and others from the Office of General Counsel. In this meeting, PlusCom discussed its views that the Commission should designate the 30 MHz Basic Trading Area broadband PCS frequency block as an "entrepreneurial band" and allow bidding from only "small

^{1/} Notice of Proposed Rulemaking, 8 FCC Rcd 7635 (1993) ("NPRM"); Second Report and Order, PP Docket No. 93-253, FCC 94-61 (April 20, 1994) ("Second Report and Order"). The Commission will adopt specific rules for broadband PCS auctions, the subject of these ex parte comments, at its open meeting on June 29, 1994.

No. of Copies rec'd
List ABCDE

044

businesses," defined for this purpose as businesses with annual revenues of less than \$100 million.^{2/}

During the meeting, discussion arose regarding the Constitutionality of a proposal PlusCom raised in Comments filed previously in this docket. In those Comments, PlusCom proposed that within the bidding structure of an entrepreneurial band, the Commission should allow a bidding credit of ten percent (10%) for businesses owned by minorities and businesses owned by women. See Ex Parte Comments of PlusCom, Inc., PP Docket No. 93-253, at 6-7 (June 1, 1994). This would further fulfill the Congressional intent that the FCC "ensure that small businesses, . . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, *bidding preferences*, and other procedures" 47 U.S.C. § 309(j)(4)(D) (emphasis added).

PlusCom's proposed bidding credit falls directly in line with the types of preferences found Constitutional in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990). Metro holds that benign race-conscious measures approved by Congress do not violate the equal protection clause if they

^{2/} The Ex Parte memo letter filed with the Secretary on June 20, 1994, summarizes PlusCom's arguments as to why an "entrepreneurial band" would fulfill the Congressional mandate to ensure economic opportunity for small businesses through the use of bandwidth assignments, 47 U.S.C. § 309(j)(4)(C), and is incorporated herein by reference.

serve important government objectives within the power of Congress and are substantially related to achievement of those objectives. Id. at 3008-09. The Commission has applied this standard to preferences in spectrum auctions generally, and has found the statutorily mandated preferences constitutionally permissible.^{3/} In relation to the bidding credits specifically, PlusCom offers the following analysis.

The Metro preferences were supported by the broad Congressional mandate that the Commission grant licenses based on the "public convenience, interest, or necessity." 47 U.S.C. §§ 151, 301, 303, 307, 309; Metro, 110 S. Ct. at 3003. As noted above, the competitive bidding statute is even clearer -- bidding credits are explicitly approved by Congress. 47 U.S.C. § 309(j)(4)(D). This satisfies the test that the benign preferences proposed by PlusCom are approved by Congress.

The important government objective in Metro, according to the Supreme Court, was to promote broadcast diversity. Metro, 110 S. Ct. at 3010. The auction statute relates a different important government objective -- that of overcoming the barriers to entry that have led to underrepresentation of minorities and women in the communications industry. Congress affirmatively stated that, despite the fact that diversity of viewpoints is irrelevant to the licenses issued pursuant to competitive

^{3/} Second Report and Order at ¶¶ 289-297.

bidding, "the Commission should adopt regulations . . . to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process."^{4/}

Bidding credits address the inability of minority and women-owned businesses to obtain capital and encourage equity funding of these entities by larger companies. Furthermore, the Commission has noted that businesses owned by minorities and/or women hire more minorities and women, thereby promoting equal employment opportunities.^{5/} Therefore, providing bidding credits to minority and women-owned businesses is substantially related to achieving Congress' objective to ensure that minorities and women are not excluded from the opportunities available by auction. With this prong of the analysis satisfied, PlusCom's proposed bidding credit preference passes Constitutional muster under Metro.^{6/}

^{4/} H.R. Rep. No. 111, 103d Cong., 1st Sess. 255 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 582.

^{5/} See, e.g., Third Report and Order, PP Docket No. 93-253, FCC 94-98, at ¶ 74 & n.41 (May 10, 1994) ("Third Report and Order") (implementing bidding credits in narrowband PCS auctions); Fourth Report and Order, PP Docket No. 93-253, FCC 94-99, at ¶ 41 & n.67 (May 10, 1994) ("Fourth Report and Order") (implementing bidding credits in IVDS auctions).

^{6/} It is at this prong of the analysis that the Commission can distinguish and dispose of Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) (opinion of Thomas, C.J.), which struck down gender-based preference in broadcast license comparative hearings because the court found no nexus between gender preferences and promoting broadcast diversity.

Finally, the Commission has adopted a 25 percent (25%) bidding credit for its upcoming narrowband PCS and IVDS auctions, thereby addressing their Constitutionality under the Metro standard.^{2/} Providing PlusCom's proposed 10% bidding credit within entrepreneurial band auctions would be consistent with the approach already taken in the narrowband PCS and IVDS auctions.

WHEREFORE, for the above stated reasons, PlusCom respectfully urges the Commission to adopt its regulations regarding the competitive bidding of broadband PCS licenses in accordance with the above proposals.

Respectfully submitted,

PLUSCOM, INC.

By: *Howard C. Griboff*
Eliot J. Greenwald
Howard C. Griboff

Its Attorneys

FISHER WAYLAND COOPER
LEADER & ZARAGOZA L.L.P.
2001 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

Dated: June 21, 1994

^{2/} See Third Report and Order at n.47 (narrowband PCS auction rules); Fourth Report and Order at n.73 (IVDS auction rules).

CERTIFICATE OF SERVICE

I, Renee Gray, a secretary to the law firm of FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P., hereby certify that on this 21st day of June, 1994, I served a true copy of the foregoing "EX PARTE COMMENTS" by hand delivery, upon the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Robert M. Pepper
Chief, Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

Donald H. Gips
Deputy Chief, Office of Plans and Policy
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

Gerald P. Vaughan
Deputy Bureau Chief (Operations)
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Ralph A. Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Thomas P. Stanley
Chief Engineer
Federal Communications Commission
2025 M Street, N.W.
Room 7002
Washington, D.C. 20554

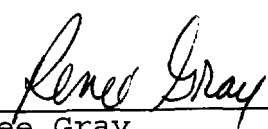
William Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Greg Rosston
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Julia Kogan
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

Geraldine Matise
Federal Communications Commission
1919 M Street, N.W., 644
Washington, D.C. 20554

Kent Nakamura
Office of Plans and Policy
1919 M Street, N.W.
Room 822
Washington, D.C. 20554



Renee Gray